

**STATE OF MICHIGAN
IN THE SUPREME COURT**

COMPLAINT AGAINST

HON. J. CEDRIC SIMPSON

14-A District Court
415 W. Michigan Avenue
Ypsilanti, Michigan 48202

**MSC NO. 150404
FORMAL COMPLAINT 96**

**BRIEF IN SUPPORT OF THE COMMISSION'S DECISION AND
RECOMMENDATION FOR ORDER OF DISCIPLINE**

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

JUDICIAL TENURE COMMISSION
OF THE STATE OF MICHIGAN

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November 17, 2015

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JURISDICTION

Judge J. Cedric Simpson (“Respondent”) is, and at all material times was, a judge of the 14-A District Court in Ypsilanti, Michigan. As a judge, Respondent is subject to all the duties and responsibilities imposed on him by the Michigan Supreme Court, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205. The Court has authority to act upon the recommendation of the Judicial Tenure Commission. Const. 1963, Art 6, §30. Michigan Court Rules 9.224 and 9.225 provide the method for this review.

STANDARD OF PROOF

The standard of proof in judicial disciplinary proceedings is by a preponderance of the evidence. *In re Morrow*, 496 Mich 291, 298 (2014); MCR 9.211(A).

STANDARD OF REVIEW

The Supreme Court reviews the Commission’s findings of fact and recommendation for discipline. *In re Morrow, supra*.

COUNTER STATEMENT OF PROCEEDINGS

In January of 2014, the Judicial Tenure Commission (“JTC” or “Commission”) opened an investigation into allegations that Respondent had interfered with the Pittsfield Township Police Department’s on-the-scene investigation of his intern’s drunk-driving collision and her subsequent arrest, and then prosecution by the township attorney, Victor Lillich. The intern, Crystal Vargas, was also a former student in a Pre-Trial Skills Course Respondent taught at Cooley Law School in Ann Arbor, Michigan. On November 12, 2014, the Commission issued a three-count Formal Complaint (FC 96) alleging that Respondent (1) interfered with a police investigation, (2) interfered with a criminal prosecution, and (3) made misrepresentations to the Commission during the investigation of this matter. On November 12, 2014, the Commission also filed with the Court a Request for Appointment of a Master. Respondent filed his Answer to FC 96 on November 26, 2014. On December 17, 2014, the Court appointed the Hon. Peter D. Houk as a Master to hear FC 96. On February 5, 2015, the Master conducted a pre-trial conference setting forth deadline dates for the exchange of witness lists, exhibit lists, proposed exhibits and witness statements. The Master’s order also provided deadline dates for filing motions and for responses to motions.

A public hearing on FC 96 began at the Washtenaw County Circuit Court in Ann Arbor, Michigan, on March 30, 2015, and continued through April 1, 2015. Oral arguments were heard at the close of the proofs. Transcripts of the hearing were filed

on April 8, 2015. On April 28, 2015, the Master filed his findings of fact and conclusions of law. The Master concluded, by a preponderance of the evidence, that Respondent had committed misconduct in office under MCR 9.205(e) by interfering in the investigation and prosecution of Vargas's criminal case. The Master also concluded that Respondent had made intentional misrepresentations or misleading statements to the Commission during the investigative stage of this matter, in his Answer to FC 96, and during his testimony at the formal hearing. On May 26, 2015, the Examiner filed with the Commission his Petition and Brief to Adopt the Master's Findings of Fact and Conclusions of Law. On the same date, Respondent filed his Objections. On June 2, 2015, Respondent filed a Reply Brief and on June 15, 2015, he filed a Rebuttal Letter. On June 23, 2015, the Examiner filed a Reply to Respondent's Rebuttal Letter. Oral arguments regarding the Master's findings were held before the JTC on June 8, 2015. The JTC issued its Decision and Recommendation for Discipline (D&R) on August 31, 2015.

The JTC determined that the Examiner had established by a preponderance of the evidence that Respondent interfered, or attempted to interfere, with a police investigation and prosecution of Vargas's drunk-driving case and that he made misrepresentations to the Commission during the investigation of this case. The Commission further concluded that since the instant proceedings were initiated, Respondent had made intentional misrepresentations or misleading statements in his Answer to FC96 and during his testimony at the public hearing. The JTC

recommended that the Supreme Court issue an order removing Respondent from the office of judge of the 14-A District Court on the basis of his judicial misconduct. The JTC also recommended, pursuant to MCR 9.205(B), that the Court order Respondent to pay the costs, fees, and expenses incurred by the Commission in prosecuting FC 96, in the amount of \$7,565,54.

Respondent filed his petition to reject or modify the JTC's recommendations on October 27, 2015.¹ The Examiner filed his response on November 17, 2015.

¹ Respondent also filed a motion to remand the proceedings, alleging prosecutorial misconduct. The Examiner has filed an answer, and that matter also remains pending before the Court.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I

DID THE COMMISSION PROPERLY FIND THAT RESPONDENT COMMITTED JUDICIAL MISCONDUCT IN COUNT I, II, AND III OF THE FORMAL COMPLAINT?

The Commission answers “YES.”

Respondent answers “NO.”

II

IS THE COMMISSION’S RECOMMENDATION FOR REMOVAL FROM OFFICE AND IMPOSITION OF COSTS WARRANTED BY RESPONDENT’S ACTS OF MISCONDUCT?

The Commission answers “YES.”

Respondent answers “NO.”

COUNTER STATEMENT OF FACTS

Respondent is a judge of the 14-A District Court which includes Pittsfield Township in its jurisdictional authority. (R's Ans. To FC 96, par. 1; Tx. p. 41) At all relevant times, Respondent was also an adjunct professor at the Ann Arbor campus of Cooley Law School. (Tx. p. 42-43) During the school's 2013 summer session, which started in early May and continued for fourteen weeks, Crystal Vargas was a student in Respondent's Pre-trial skills course. (Tx. p. 45-46) In June of 2013, Vargas provided Respondent with a resume and a cover letter for an internship position at the 14-A District Court.¹ (Tx. p. 54) Without requiring a formal employment application or a security screening, Respondent accepted Vargas as his intern.² (Tx. p. 55-56; p. 58) On July 10, 2013, Vargas started her internship, working exclusively for Respondent in his courthouse chambers. (R's Ans. To FC 96, par. 5-6, Tx. p. 59.)

Within two weeks, Respondent and Vargas began to exchange phone calls and text messages.³ What started with nine texts transmitted on July 23, 2013, grew into hundreds less than a week later. (E's Exh. 32) Many of the text messages and phone calls were exchanged not only after business hours, but in the middle of the night and into the early morning hours of the following day. (E's Exh. 31; E's Exh. 32) By September 1, 2013, Respondent and Vargas had exchanged almost 8,000 text

¹ Respondent was the only judge at the 14-A District Court who had interns. (Tx. p. 370)

² Besides Vargas, between May and August of 2013, Respondent had approximately 12 interns. (Tx. p. 57)

³ According to Sprint's Norman Ray Clark, the times noted for all text messages in Examiner's Exhibits 31 and 32 are in the Central Time Zone, which is one hour behind Michigan's Eastern Time Zone. The times noted for phone calls in Exhibits 31 and 32 are in the Eastern Time Zone. The text time references made in this brief are all converted to Eastern Time Zone, as they were at the hearing before the Master. (Tx. p. 27; p. 30)

messages and phone calls with some of the calls lasting for over an hour. (E's Exh. 31; E's Exh. 32)

On Saturday, September 7, 2013, Respondent and Vargas began texting each other shortly after 10:30 AM. (E's Exh. 31, line 9871) By 9:00 PM, they had exchanged seven phone calls and more than 150 text messages, including 74 texts during Vargas's law school class which was held on-line between 1 and 4 PM.⁴

Between 4:20 and 4:25 AM on the morning of Sunday, September 8, 2013, Respondent and Vargas exchanged six text messages. The first of these messages was sent by Vargas to Respondent at 4:20:09 AM (E's Exh. 31, line 10170) and the last was sent by Respondent to Vargas at 4:23:00 AM. (E's Exh. 31, line 10175) It was followed by a phone call from Vargas to Respondent at 4:24:33 AM (E's Exh. 31, line 10177) During these text exchanges, Vargas was driving northbound on Platt Road, less than two miles from Respondent's residence.⁵ (Tx. p. 259-260) As she approached Michgian Avenue, she encountered a flashing red light. Although she stopped for several seconds (Tx. p. 177; E's Exh. 27, p. 36), Vargas proceeded through the intersection without yielding to the approaching traffic which included a tow truck traveling westbound on Michigan Avenue. Unable to stop, the tow truck, driven by Allan Cook, struck Vargas' vehicle as it entered the intersection. (Tx. 177-178)

⁴ Vargas testified in her de bene esse deposition (E's Exh. 27, p. 13) that she attended that class in its entirety.

⁵ The direction in which Vargas was driving was away from Respondent's house located at 7740 Platt Road (Tx. p. 46; p. 281)

After the collision, Cook and Vargas pulled into an adjacent parking lot. (Tx. p. 178) Once there, Vargas immediately used her cell phone to make the 4:24:33 AM call to Respondent. (Tx. p. 179; E's Exh. 27, p. 36) While Vargas was still on the phone with Respondent, Pittsfield Township Police Officer Robert Cole arrived at the scene. After a brief conversation with Cook, the officer approached Vargas (E's Exh. 7 @4:26:55; Tx. p. 244; E's Exh. 271, p. 38) and after ascertaining that she was not injured, instructed her to hang up the phone. (Tx. p. 244; p. 180; E's Exh. 27, p. 38; E's Exh. 7 @4:27:08) After advising Respondent that an officer was approaching her, Vargas terminated her and Respondent's conversation. (E's Exh. 27, p. 38)

Based on Vargas' statement that she had been drinking and that her last drink was one hour earlier (E's Exh. 7 @4:27:40), Officer Cole began an investigation into whether the accident was caused by Vargas' consumption of alcohol. (E's Exh. 7 @4:27:44) Less than three minutes later, while Officer Cole was administering the first sobriety test, Respondent drove up to the scene. (E's Exh. 7 @4:29:56; Tx. p. 95) Once there, Respondent parked his vehicle (Tx. p. 246-247), and began to approach the location where Officer Cole and Vargas were standing. (Tx. p. 248) Believing that it may be a member of Vargas's family or a friend (Tx. p. 247-249), Officer Cole asked Vargas if she knew the identity of the person approaching. Giggling, Vargas identified Respondent as "Judge Simpson" for whom she was interning. (E's Exh. 7 @4:30:25; Tx, p. 248) At a distance of approximately 30 feet, Respondent stopped and addressed Officer Cole. (E's Exh. 7 @4:30:45). Not wanting

any further intrusion into his investigation scene, (Tx. p. 249), Officer Cole suspended the “walk and turn” sobriety test he was administering to Vargas, and walked over to Respondent, leaving Vargas unattended. (E’s Exh. 7 @4:30:52)

When Officer Cole approached, Respondent immediately identified himself as “Judge Simpson,” informed the officer that Vargas was his intern (Tx. p. 100), and began asking questions about how the accident happened. (E’s Exh. 7 @4:30:54) Rather than following his routine practice of having family members return to their vehicles and wait until the investigation is completed, Officer Cole deferred to Respondent’s status as a judge and proceeded to answer his questions. (Tx. p. 250) When Officer Cole advised Respondent that Vargas was unhurt (E’s Exh. 7 @4:31:04, Tx. p. 250), and that he was trying to make sure that she was “okay to drive” (E’s Exh. 7 @4:31:10), Respondent inquired “Well, does she just need a ride or something?” (E’s Exh. @4:31:15; Tx. p. 253) Thereafter, without seeking or obtaining Officer Cole’s permission (Tx. p. 251), Respondent walked over to Vargas and began a conversation with her. (E’s Exh. 7, at 4:31:19; Tx. p. 252) Once again, he was informed, this time by Vargas herself, that she was “fine” (E’s Exh. 7, @4:31:20; Tx. p. 252). Vargas also provided Respondent with the details of what lead to the accident. After some time had passed, Officer Cole interrupted Respondent’s and Vargas’s conversation to resume the sobriety test instructions. (E’s Exh. 7 @4:31:47; Tx. p. 255) Although Respondent moved a short distance away, he

remained in proximity during most of Vargas's sobriety testing. (E's Exh. 7, @4:31:55; @4:33:34; @4:36:22)

After failing her field sobriety tests (Tx. p. 260), Vargas was escorted to the front of Officer Cole's patrol car where she was asked to submit to a preliminary breath test (PBT). (Tx. p. 260) Based on the result of that test, a .137 (E's Exh. 7, @4:39:44; Tx. p. 260), Vargas was arrested and placed in the back seat of the police vehicle. (Tx. p. 260-261 E's Exh. 7, @4:39:50) Thereafter, Officer Cole walked to Respondent and advised him of the reason for the arrest, including the result of the PBT test. (Tx. p. 261) As a courtesy and to avoid extra expenses to Vargas, Officer Cole offered to have Respondent take possession of Vargas's 2007 Mercedes rather than having it towed. (Tx. p. 262; E's Exh. 7, @ 4:41:01; E's Exh. 43)

A few minutes later, while Officer Cole was away from Vargas and was speaking with the tow truck driver, Respondent walked around the scout car to approach Vargas as she was seated in the back seat, handcuffed and in custody. (E's Exh. 7, @4:43:22) Not only had Respondent not sought permission to do so, his action again caused Officer Cole to interrupt his investigation so that he could return to the patrol car. (Tx. p. 263-264; E's Exh. 7, @4:43:28) A short time later, while the ambulance attendants were obtaining Vargas' insurance information, Respondent, for the first time, asked Officer Cole if he could speak with her.⁶ Cole granted Respondent's request. (Tx. p. 264; E's Exh. 7, @ 4:44:50) Although anyone having

⁶ The Huron Valley Ambulance (HVA) was coincidentally following the tow truck, without lights or sirens, and pulled into the parking lot after the accident. Vargas refused any medical care.

contact with a prisoner must be searched for weapons and/or contraband, Officer Cole did not search Respondent, again due to his status as a judge, before allowing him to have an unrestricted contact with Vargas. (Tx. p. 265)

What followed in the back of the police car was a whispered conversation between Respondent and Vargas. (E's Exh. 7, @4:44:52) During that conversation Respondent assured Vargas that she was not out of law school and that he was there to "help" her. (E's Exh. 9, Seg. 2 w/in-car mic. Enh.⁷) Respondent also told Vargas that he would come and "get her" when she was released from jail. (E's Exh. 9, Cap. Seg. 2 w/in-car mic. Enh.) In turn, Vargas confirmed that her PBT result was .137 and consented to having Respondent take possession of her car keys and cell phone. (E's Exh. 9, Cap. Seg. 2 w/in-car mic. Enh.) When the conversation was over, Respondent left the scene⁸ and Vargas was transported to the Pittsfield Township Police Department. (Tx. p. 265)

Once at the station, Officer Cole secured Vargas in the processing area and immediately began to look for his sergeant, Henry Fusik. (Tx. p. 266-267) Having never had a judge show up at an investigation scene (Tx. p. 267), Cole wanted to make his superior officer aware of Respondent's appearance and conduct. (Tx. p. 267) In turn, Sgt. Fusik, who likewise had not encountered such a situation in his 20 years with the Pittsfield Township Police (Tx. p. 283), sent an immediate e-mail notification to the Director of Public Safety, Matthew Harshberger (Chief

⁷ Captured Segment 2 with in-car microphone enhanced.

⁸ Because Respondent left the scene with Vargas' car keys and the vehicle could not be secured without a key, Vargas agreed to have it towed to Sakstrup's Towing & Service rather than leaving it unlocked in the parking lot. (E's Exh. 7)

Harshberger). (Tx. p. 291-292; p. 344-345) Sgt. Fusik also instructed Officer Cole to complete Vargas' processing and to prepare his report before the end of his shift. (Tx. p. 291) Following orders, Officer Cole had two Data-Master tests administered to Vargas, both of which resulted in a .10 level of alcohol content. (E's Exh. 6; E's Exh. 43). Thereafter, Vargas was transported to the Washtenaw County Jail (Tx. p.291, E's Exh. 27, p. 50) where she remained until 8:00 o'clock that morning, Sunday, September 8, 2013.

Immediately upon being released, Vargas took a cab to Respondent's home. (Tx. p. 122; E's Exh. 27, p. 53) From there the two of them drove to Sakstrup's Towing & Service to recover her vehicle. When Vargas's credit card was declined, Respondent provided his own card to pay the towing fees on her vehicle. (Tx. p. 126-127). During the remainder of that day, Respondent and Vargas exchanged over 100 text messages and 2 telephone calls.

On Monday, September 9, 2013, Chief Harshberger contacted his Deputy Chief, Gordon Schick, with instructions that the Vargas matter be handled like any other alcohol-related arrest. (Tx. p. 344) Consistent with those instructions, on Wednesday, September 13, 2013, a warrant was submitted to the Pittsfield Township City Attorney, Victor Lillich, requesting an Operating a Motor Vehicle While Intoxicated (OWI) charge against Vargas. (Tx. p. 304-305; Tx. p. 346)

On Tuesday, September 10, 2013, the day before the warrant request was presented, Lillich received a phone call from Respondent. (Tx. p. 298) During that

call, Respondent praised Vargas as a “good kid” from Texas (Tx. p. 301) who was a law student (Tx. p. 301) as well as his intern (Tx. p. 301) and who was in a “bad personal relationship.” (Tx. p. 302) Reminding him that he had previously met Vargas at the courthouse, Respondent also told Lillich that Vargas was going to be assigned to a mediation/facilitation matter in which Lillich was also involved. (Tx. p. 300-301)

Respondent also raised an evidentiary issue by pointing out that a significant discrepancy existed between the on-the-scene PBT test results and the results of the Data-Master test administered at the station. (Tx. p. 303) Although Lillich felt that this discrepancy was not sufficient to deny the warrant request (Tx. p. 303-304), he agreed to provide Respondent with any police reports that came to his office. (Tx. p. 303).

On September 13, 2013, after receiving and reviewing the Vargas warrant request, Lillich emailed a copy of the police reports to Respondent. In the same transmission, Lillich advised Respondent that other than the deviation between the PBT and the Data-Master results, the case presented “nothing out of the ordinary” (Tx. p. 306) and that he “would be authorizing an OWI 1st” offense against Vargas. (E’s Exh. 37; Tx. p. 306). That email was re-sent to Respondent on September 15, 2013, due to what Lillich believed was a transmission error with his September 13, 2013 email. (Tx. p. 307; E’s Exh. 38) It is undisputed that by September 15, 2013, Respondent was in possession of the police reports he had requested (Tx. p. 154) and

that by September 16, 2013, he had reviewed those reports. (Tx. p. 155) It is also undisputed that Lillich did not issue any charges against Vargas on September 13, 2013 or on September 15, 2013. (Tx. p. 319)

On September 17, 2013, Respondent contacted Lillich again. (Tx. p. 309; E's Exh. 39) After again being advised that the difference between the breath test results did not call for a denial of the warrant request (Tx. p. 309), Respondent proceeded to discuss the names of attorneys that Vargas should retain. (Tx. p. 310). When Lillich suggested attorney Joe Simon (Tx. p. 310), Respondent commented that [*he*] could not "use" him because Simon represented Nader Nassif, a criminal defendant whose case was pending on Respondent's docket. (Tx. p. 311, Tx. p. 317) Respondent explained that he had been "sitting" on the Nassif matter and that it was "messy." (Tx. p. 317-318) After Lillich suggested Michael Vincent as another potential choice of attorneys for Vargas, Respondent countered with attorney John Shea and asked Lillich how well he got along with him. (Tx. p. 311-312) Lillich advised Respondent that he had no problems with Shea and that he thought highly of his professional abilities.

Lillich also offered to "sit" on the case until Vargas retained an attorney who could contact him to discuss any potential "problems" with the case. (Tx. p. 312; p. 314) Respondent accepted that offer (Tx. p. 314) and on October 1 or October 2, 2013, Shea called Lillich to state that he was Vargas' attorney. (Tx. p. 325; E's Exh. 40) During that initial phone conversation, without having received any discovery

materials, Shea raised the same evidentiary issue that had been raised by Respondent. (Tx. p. 327)

On October 17, 2013, while waiting for another call from Shea, Lillich received an email from Chief Harshberger (Tx. p. 322; E's Exh. 42) inquiring about the status of the Vargas warrant request. (Tx. p. 324; p. 347) In his response, Lillich assured the chief that he had every intention of authorizing the case but that out of "respect" and "deference" to Respondent, he was "sitting on it until [he] again heard from Mr. Shea to discuss the *issues raised by the judge.*" (Emphasis provided) (E's Exh. 42, Tx. p. 324) In his reply, Chief Harshberger expressed his disapproval of Respondent's interference in the Vargas matter and demanded that the charges be issued immediately. He also advised Lillich that a "supplemental report would be completed documenting Respondent's involvement." (E's Exh. 42)

Despite his assurances to Chief Harshberger that the case was ready for authorization, Lillich failed to process or issue it, and on October 21, 2013 (Tx. p. 349), he returned it to the Pittsfield Township Police Department as "denied." (Tx. p. 321; p. 349; E's Exh. 11) Lillich also disqualified himself and his law firm from the Vargas matter in order "to avoid any inference of impropriety." (Tx. p. 319, E's Exh. 11) In December of 2013, at a Christmas party, Lillich personally apologized to Respondent for not being able to "handle" the Vargas case and for having to recuse himself. (Tx. p. 330).

On October 28, 2013, the Pittsfield Township Police Department re-submitted the Vargas warrant request to the Washtenaw County Prosecutor's Office. In less than a week, Vargas was charged with one count of OWI 1st offense. (Tx. p. 349) Following the disqualification of the entire 14-A District Court bench (E's Exh.13; Tx. p. 170-172), the Hon. Theresa Brennan was assigned to the Vargas matter as a visiting judge. (E's Exh. 117) On January 8, 2014, Vargas pled guilty as charged (E's Exh. 117) and on February 21, 2014, she was sentenced to fines, costs, 6 months of probation, and a 93-day suspended jail sentence with credit for one day she had served. (E's Exh. 27, p. 61; Tx. p. 361; E's Exh. 117)

ARGUMENT

I. INTRODUCTION AND SUMMARY

Adopting the Master's findings of fact, the Commission concluded, as did the Master, that the Examiner had established by a preponderance of the evidence that Respondent interfered with the police investigation and the prosecution of Vargas's drunk-driving case. (D&R, p. 2, p. 13; MR, p. 3, 5) The Commission also agreed with the Master's conclusion that the Examiner established by a preponderance of the evidence that Respondent made numerous intentional misrepresentations during the course of the investigation of this matter, in his Answer to FC 96, and during his under-oath testimony at the public hearing. (D&R, p 2, p. 13; MR, p. 5-11)

In reaching these conclusions, the Commission and the Master relied on the overwhelming evidence of Respondent's improper actions at the scene of Vargas's accident and arrest, including his appearance, his self-introduction as a judge, his involvement in the scene beyond assuring himself of Vargas's safety, and his subsequent offer to "just" give her a ride. (MR, p. 3; D&R, p. 5) The Commission and the Master also relied on the undisputed evidence of Respondent's repeated calls to Mr. Lillich to argue in support of Vargas's character and against the reliability of the evidence against her and to discuss the potential attorneys that Vargas should consider retaining. The testimonial, video, and documentary evidence overwhelmingly establish that Respondent repeatedly lied about his relationship with Vargas and with regard to his intent and actions both at the crime scene and in his repeated contacts

with the township attorney (Lillich). Despite his efforts to portray himself as a man of impeccable honesty, he lied to and misled the Commission, during the investigation and in the pleadings, and he lied under oath at the hearing.

The Commission rejected the Master's conclusion that Respondent committed "misconduct in office." (MR, p. 14) The Master erroneously relied on Michigan Court of Appeals decisions which involved a criminal charge of "misconduct in office" filed under the Michigan Penal Code with a burden of proof of beyond a reasonable doubt. The allegation of "misconduct in office" in FC 96, on the other hand, is a disciplinary violation of the Michigan Code of Judicial Conduct and falls under the Michigan Constitution of 1963, Article 6, Section 30 and MCR 9.205 (A) and (B) (1) (a) through (f) with a burden of proof of preponderance of the evidence. The Commission correctly found that Respondent's conduct breached the standard of judicial conduct and that he is responsible, among other things, for "misconduct in office." (D&R, p. 12)

Based on the evidence presented at the formal hearing, the Commission appropriately recommended that the Court remove Respondent from the office of judge of the 14-A District Court. Further, based on the intentional misrepresentations and misleading statements that Respondent made in his Answer to FC 96 and during his under-oath testimony at the public hearing, the Commission properly recommended that the Court order Respondent to pay costs, fees, and expenses in the amount of \$7,565.54, pursuant to MCR 9.205 (B).

II. ACTS OF JUDICIAL MISCONDUCT

A. COUNT I – INTERFERING WITH POLICE INVESTIGATION

As the Commission stated in its Decision and Recommendation, Respondent used his judicial office to interfere, or to attempt to interfere, with a police investigation. (D&R, p. 5) The same conclusion was reached by the Master, who, as the Commission pointed out, presided over the formal hearing and who had the superior ability to observe the witnesses's demeanor and to assess their credibility. (Cf. *In re Lloyd*, 424 Mich 514, 535; 384 NW2d 9 (1986)) The Commission's and the Master's findings are overwhelmingly supported by the evidence.

In reaching their conclusions, the Commission and the Master noted not only the proximity of the accident to Respondent's home, but the fact that Vargas contacted Respondent immediately after the crash, and that within a very short period of time he had appeared at the scene. (D&R, p. 4) When Respondent terminated his telephone conversation with Vargas at 4:24:33 AM, he knew that a police officer was present at the location. (E's Exh. 27, p. 38) Despite that knowledge, Respondent drove the 1.7 miles (Exh. 73), arriving at the intersection of Platt Road and Michigan Avenue in less than three minutes from the time he answered Vargas's call. (Tx. p. 47-48; E's Exh. 73) That time period included not only Respondent's travel time but also his conversation with Vargas in which she told him that she had "crashed" (Tx. p. 90), advised him that she was fine (Tx. p. 91), and answered Respondent's

questions as to her location (Tx. p. 91).⁹ It also included the time necessary for Respondent to get out of bed, go to his daughter's room to wake her up and advise her that he was leaving, and to get his shoes, hat, and keys before leaving his house. (Tx. p. 90-92)

Respondent's claim that he had appeared at the scene of Vargas's arrest out of concern for her safety from a violent ex-boyfriend, Matthew Foglia, was clearly false. (Tx. p. 213) Vargas testified that she was never a victim of physical violence from her ex-boyfriend. (E's Exh. 27, p. 27-29) Vargas's testimony was corroborated by a police report she had filed in January of 2013, in which she specifically denied any violence by Foglia. (E's Exh. 27, Attached Exhibit 3) Second, as the Master pointed out in his Findings of Fact and Conclusions of Law, if Respondent was so concerned for Vargas' safety, logic dictates that he would have made inquiries about Foglia when he first arrived at the scene of the accident. (MR, p. 10) That same logic dictates that, at the very least, Respondent would have made Officer Cole aware that Foglia may have caused or contributed to the collision and may still be present in the area. Not only did Respondent fail to say anything about Foglia to Officer Cole, he likewise failed to ask Vargas any questions about Foglia when, without Officer Cole's permission, he approached her and discussed the crash. (E's Exh. 7; E's Exh. 9; Tx, p. 106)

⁹ It was Respondent's testimony that when he answered his phone in the early morning hours of September 8, 2013, and asked Vargas where she was, the only words he could understand from her were "Burger King" and "Michigan." Although he claims that she was not at his house prior to the accident and he did not know that she was in the area, he immediately knew the exact location of the accident.

Respondent's argument that his on-the-scene conduct cannot be seen as an attempt to interfere because he did not ask Officer Cole "to do anything or to refrain from doing anything" specific (R's brief, p. 6) and because he "did not ask [Officer Cole] to change anything or hide anything or pretend anything did not exist" (R's brief, p. 7) is without merit. Although Respondent did not per se tell Officer Cole "I don't want you to do your job" or "I want you to release Ms. Vargas," his judicial position, his appearance at the scene, and his actions, were clearly intended to, and actually did, cause Officer Cole to alter the regular course of his investigative behavior. The fact that Officer Cole did not abandon his investigation and forego Vargas's arrest does not diminish the impropriety of Respondent's actions and does not undermine the Master's and the Commission's conclusions that he interfered or attempted to interfere with the police investigation. As the Master observed, once Respondent spoke to Officer Cole and it was established that Vargas was okay, he should have left the scene without any further involvement. (MR, p. 3) Rather than doing so, Respondent engaged in conduct which constituted a "distraction" from the officer's duties and an "interference" with the officer's performance of his duty. (MR, p. 3)

Respondent's "interference" with the police investigation started almost immediately after he had arrived on the scene and began to approach Officer Cole and Vargas. Although under normal circumstances anyone making such an approach would have been told to return to his/her vehicle and remain there until the

investigation was completed (Tx. p. 248-249), Officer Cole, having been advised by Vargas that Respondent was “Judge Simpson,” interrupted his investigation and left his OWI suspect unattended in order to deal with Respondent. (Tx. p. 249) Respondent’s claim that he did not know, or did not recollect, that Officer Cole was conducting sobriety tests on Vargas when he first approached the scene is unpersuasive and contrary to the evidence. (R’s Ans. to FC 96, par. 17) Respondent has been an attorney for decades and prosecuted OUIL¹⁰ and OWI¹¹ cases as the city attorney for Superior Township before taking the bench in September of 1999. (Tx. p. 44-45) He also presided over numerous alcohol-related cases as a judge at the 14-A District Court. As Respondent himself admitted, he was well aware of the procedures and the issues in drunk-driving cases. (Tx. p. 45)

Even *if* Respondent did not know that Officer Cole was administering sobriety tests to Vargas when he first arrived on the scene, he certainly became aware of it when Officer Cole advised him that he was “just trying to make sure she’s okay to drive.” (E’s Exh. 7; E’s Exh. 9; Tx. p. 105) In view of Respondent’s prosecutorial and judicial experience, this was a clear indication that Officer Cole suspected Vargas of driving while drunk. (Tx. p. 105) Rather than leaving the scene, Respondent asked Officer Cole “well, does she just need a ride or something?” Despite his efforts to now present it as “benign” (R’s Brief, p. 6, 8), it is clear, as the Master stated, that

¹⁰ Operating Under the Influence of Liquor.

¹¹ Operative While Intoxicated

Respondent's question was designed to imply that "he was available to short circuit the [officer's] investigative process." (MR, p. 10)

This attempt at short circuiting Officer Cole's investigation continued even after Cole interrupted Respondent's conversation with Vargas and resumed his instructions for her next sobriety test. Although he walked a short distance away, Respondent remained in the area, pacing, leaning against the ambulance, talking to witnesses, following Officer Cole and Vargas and communicating with her. This is clearly visible in the police-in dash video which shows Vargas communicating with Respondent as she was standing by the scout car waiting for Officer Cole to retrieve a PBT test kit. (E's Exh. 7, @4:38:48; Tx. p. 256) Contrary to Respondent's assertion that he had "spent much of his time at the scene near his own vehicle" and that he "consistently remained at respectful distances from the officer and Ms. Vargas," Respondent was clearly close enough for Vargas to believe that he could see and understand the words she was mouthing to him. (E's Exh. 7; E's Exh. 9; Tx. p. 256)

Likewise false was Respondent's testimony that since he did not know if Vargas's vehicle was drivable he remained on the scene to see whether she would need a ride. (Tx. p. 221) Respondent not only remained on the scene long after Vargas was arrested (E's Exh. 7; E's Exh. 9), he continued to interfere with the investigation by crossing in front of the police car and, without permission, walking to where Vargas was seated, handcuffed, and clearly in custody. (E's Exh. 7; E's Exh. 9) Once again, Respondent's conduct caused Officer Cole to interrupt his investigation so he

could return to his patrol vehicle where Respondent was standing. (E's Exh. 7, E's Exh. 9) Even after he granted Respondent's request to speak with Vargas, Officer Cole did not follow his policy of searching Respondent, as he would have anyone else who had contact with an in-custody suspect. As Officer Cole testified at the formal hearing, he did not do so because Respondent "was a judge." (Tx. p. 265)

Perhaps the most compelling evidence of Respondent's motive and purpose for appearing at the scene of the accident as well as for his contacts with Lillich is found in the comments Respondent made to Vargas after she was arrested and was seated in the back seat of the patrol vehicle. As shown in the police in-dash video, Respondent, while leaning into the scout car and whispering, assured Vargas that her law school career was not over, that he was there to "help" her, and that he would "come and get [her]" after she was released from the jail. (E's Exh. 7; E's Exh. 9; Tx, p. 120) These comments clearly demonstrate that Respondent's actions were motivated not by his concern for her safety from an abusive ex-boyfriend but by his desire to get her out of trouble.

B. COUNT II – INTERFERING WITH THE PROSECUTION

Unsuccessful in his attempts to circumvent Vargas' legal troubles at the scene of the accident, Respondent continued his efforts by contacting the township prosecutor, Victor Lillich. Based on the evidence presented at the formal hearing, the Commission as well as the Master concluded that Respondent interfered with the prosecution of Vargas's criminal case (D&R, p. 7; MR, p. 5) and that Respondent's

explanations for his contact with Lillich were not credible. (MR, p. 5) The Commission's and the Master's conclusions are overwhelmingly supported by the evidence.

It is undisputed that Respondent's first telephonic contact with Lillich was on September 10, 2013. It is also undisputed that at the time of that contact, Lillich had not yet received Vargas' warrant request from the Pittsfield Township Police Department. With Lillich knowing absolutely nothing about the case or its defendant, Respondent proceeded to introduce Vargas as a "good kid" from Texas who was involved in a bad personal relationship. Respondent also advised Lillich that Vargas was a law student and an intern at the 14-A District Court. Finally, Respondent informed Lillich that he had previously met Vargas at the courthouse and would be working with her in the future on a mediation/facilitation matter in which Lillich was involved. (Tx. p. 300-301)

Immediately thereafter, Respondent directed the conversation to the discrepancy between the result of Vargas' PBT and the Data-Master tests. (Tx. p. 302-303) By asking Lillich to compare the results of those two tests to the result of the PBT given to Vargas at the Washtenaw County Jail at the time of her release, Respondent was attacking the accuracy and the reliability of the evidence. This was the same evidentiary issue that Vargas' attorney, John Shea, raised two weeks later in his initial conversation with Lillich. As Shea had testified during the formal hearing,

...if there was a reason why this charge should not be brought because of --of, you know, whatever evidentiary

anomalies I might see, then I would have preferred to see her not charged rather than to see her charged and have to litigate it, because it just makes it easier. (Tx, p. 361)

Clearly, Shea's calls to Lillich were designed to secure a denial of the warrant request presented against his client. However, while completely proper when made by an attorney advocating on behalf of his/her client, when made by Respondent, the calls represented an improper abuse of his judicial position and an obstruction of justice.

Respondent's assertions that his contact with Lillich was only to obtain the police reports so he could verify Vargas's representations to him about her breath test results (Tx. p. 140-141) and to decide whether he should keep her as an intern are contradicted by the formal hearing evidence. (MR, p. 5) First, Respondent had been in contact with Vargas, via text messages, immediately prior to the accident as well as throughout the evening of September 7 and throughout the entire day of September 8, 2013. (E's Exh. 31) Second, he was present at the scene of her arrest and was advised of the results of the PBT test by Cole as well as by Vargas. Third, if Respondent wanted to know the results of the Data-Master test, he could have called the Pittsfield Township Police Department's Deputy Chief Gordon Schick with whom he had met regularly for "business lunch[es]" (Tx. p. 142) rather than Lillich whom, as Respondent himself admitted, he had not seen or spoken with in a long time. (E's Exh. 2, p. 4, par. 26; Tx. p. 136) Finally, as the Master pointed out, a concern about

an intern's integrity would not be prefaced with statements about her being a "good kid from Texas [who was] in a bad relationship." (MR, p. 5)

Even if Respondent's assertions as to the purpose of his initial call to Lillich are accepted as true, it is undisputed that by September 15, 2013, after he had received a copy of the police report, Respondent had the necessary information to make his decision about Vargas' internship. (Tx. p. 154; E's Exh. 38) Nevertheless, Respondent continued contacting Lillich to discuss the evidence and which attorney was best suited to represent Vargas. Furthermore, even after Vargas pled guilty to the OWI offense, she remained as Respondent's intern. (E's Exh. 27, p.149) This evidence provided clear proof that Vargas was far more than a former student or an employee (MR, p. 10) and that Respondent's motives were not to protect the "integrity of the court," as he had testified during the formal hearing (Tx. p. 225), but to influence Lillich's prosecutorial decision.

This conclusion is supported by Lillich who recognized that Respondent had made the initial call to him "knowing that [he] might be the person who was going to be prosecuting the case." (Tx, p. 302) Although Lillich stated that it is not unusual for an attorney to contact him about a client's matter before a warrant request is presented, he admitted that such contact happens,

..frequently, where somebody gets arrested. They go to an attorney. The attorney contacts my office. They recognize that I'm likely to be the prosecutor, and I'll have a conversation with them about the case even before I have any information. (Tx. p. 337) (Emphasis provided)

While he may have previously received such phone calls from attorneys, Lillich was clear that in his 25 years in the legal profession and as a township prosecutor, he had never received such a phone call from a judge as he had from Respondent. (Tx. p. 331)

While Lillich testified that he “[did not] deal out favors, *for the most part*” (Emphasis provided) (Tx. p. 333), he acknowledged that he had known Respondent for 25 years, that they’ve had “beers together from time to time” (Tx. p. 333), and that he had been to a “couple of parties with [Respondent] over the years.” (Tx. p. 333) He also acknowledged that his position as a township attorney gave him the opportunity to exercise discretion when appropriate” (Tx. p. 334) and to give consideration to cases that “*require* a little bit of consideration.” (Emphasis provided) (Tx. p. 333-334) By calling Lillich before the Vargas warrant was presented and by attacking the validity and accuracy of the evidence, Respondent was using his personal and professional relationship with Lillich as well as his judicial position to ensure that Vargas was given *every* “consideration” possible, whether it meant a complete denial of the warrant request or the issuance of a lesser, non-alcohol related charge. As Vargas’ attorney testified, the reason *he* had raised the breath test deviation issue with Lillich was that it was in Vargas’ best interest, as a law student who was going to graduate and apply for character and fitness, not to be charged in the first place rather than to be charged and have to litigate evidentiary issues. (Tx. p.

361) By repeatedly calling Lillich, Respondent likewise became Vargas' personal advocate seeking to accomplish the same objective.

Respondent's personal involvement in Vargas' case was also evident in his reaction to Lillich's September 17, 2013, suggestion of Joe Simon as her attorney. In rejecting Simon, Respondent made comments such as "[I] can't use him" (Tx. p. 317) "[Simon] is not a good candidate" (Tx. p. 317), and "[I] don't want Joe Simon" (Tx. p. 318). These comments clearly demonstrate that Respondent was personally involved in the decision of who would be representing Vargas. In fact, it was John Shea, an attorney suggested by Respondent, who ultimately became Vargas's attorney. These comments also prove that Respondent's testimony before the Master that on September 8, 2013, he provided Vargas with the names of three attorneys, including Joe Simon's, was false. It is undisputed that on September 8, 2013, Respondent was aware that Simon represented the defendant in *People v. Nassif* and that the case was pending on Respondent's docket since early August. (E's Exh. 117)

It is undeniable that Respondent's actions and personal involvement affected the way Lillich treated the Vargas warrant request. While he testified that he normally made every effort to process all warrant requests and complaints "as they came in" and "always...[had a] practice to get them turned over within a week after [receiving them]" (Tx, p. 338), with respect to the Vargas warrant request, Lillich *sat* on it and delayed its issuance for more than a month out of "deference" to Respondent and until he heard from Vargas's attorney to discuss "the issues raised by the judge." (E's Exh.

42; Tx, p. 324) This, despite repeatedly stating that the case presented “nothing out of the ordinary” and that he “always knew that [he] was going to issue the charges.” (E’s Exh. 42)

It is also undeniable that the delay in the processing of Vargas’s warrant was the basis for Chief Harshberger’s email to Lillich wherein he objected to Respondent’s “[interference] with th[e] case, especially before it is even authorized and before court proceedings.” (E’s Exh. 42) Ultimately, Lillich felt he had no choice but to disqualify himself and his law firm and to return the warrant request to the police department as “denied” with a recommendation that it be reviewed under state law. (E’s Exh. 11) A month later, Lillich apologized to Respondent for “not being able to deal with the Vargas warrant.” (Tx. p. 330)

Based on this overwhelming evidence, the Master and the Commission properly determined that Respondent interfered, or attempted to interfere, with the prosecution of the criminal case against Vargas. (D&R, p. 7; MR, p. 5)

C. COUNT III - MISREPRESENTATIONS

The Commission and the Master appropriately determined that Respondent made intentional misrepresentations or misleading statements during the investigation of this matter, in his Answer to FC 96, and during his testimony at the formal hearing. (D&R, p. 2; MR, pp. 5-12) These misrepresentations included his claims regarding the nature of his relationship with Vargas, the purpose of the thousands of texts and cell phone calls he had exchanged with her, and the specific texts that were

exchanged in the early morning hours of September 8, 2013. Respondent's misrepresentations also included the false explanations for his appearance and for his conduct at the scene of Vargas's accident and arrest, and the reasons that he contacted Mr. Lillich with regards to Vargas's criminal case. The evidence presented at the formal hearing overwhelmingly supports the Commission's and the Master's findings.

Respondent's denials of a "personal" relationship with Vargas were clearly false. The sheer number of the text messages and phone calls that Respondent exchanged with Vargas, over 14,000 in a four-month period, is indicative of a personal, rather than a professional relationship. (MR, p. 6; D&R, p. 9-10) It also refutes his claims that his contacts with Vargas were limited to group settings. (E's Exh. 4, p. 1) When that evidence is considered in conjunction with the rate at which these text and phone contacts escalated shortly after Vargas commenced her internship in Respondent's chambers and the times of day *and night* that they were made, it demonstrates that, as the Master stated, "Ms. Vargas...was clearly more than a mere employee." (MR, p. 10).

Respondent's assertions, in his Answer to FC 96 and in his testimony before the Master, that this extreme volume of electronic communication with Vargas was related to *People v. Nassif*, a criminal case that was pending on his court's docket in 2013, were also proven false and were properly rejected by the Master as well as the Commission. (MR, p. 6-8; D&R, p. 9-11) As the Commission and the Master stated, Respondent's explanation not credible in view of the number of text and cell phone

calls he had exchanged with Vargas and the fact that a great majority of them were transmitted after business hours, late at night, or in the early morning hours. (D&R, p. 10; MR, p. 8) Respondent's explanation was also contradicted by his own answers to the Request for Comments (E's Exh. 2) and the 28-day letter (E's Exh. 4) neither of which ever mentioned the *Nassif* case. (MR, p. 7) In fact, in those two documents (E's Exh. 2; E's Exh. 4), which were submitted to the Commission before FC 96 was filed and before discovery materials¹² were exchanged, Respondent claimed that his contacts with Vargas were related to the personal problems she was allegedly experiencing with her ex-boyfriend. (E's Exh. 2, p. 2, par. 8; E's Exh. 4, p. 2) That explanation was also discredited by Vargas who testified that she was never a victim of any violence at the hands of her ex-boyfriend and that the first time she and Respondent spoke about any domestic abuse issues was in early August of 2013. (MR. p. 8; E's Exh. 27, p. 82) By that time, as the Master noted, Respondent had exchanged more than 1,100 texts and cell phone calls with Vargas. (E's Exh. 31; E's Exh. 31A; MR, p. 8)

Finally, it is undisputed that the *Nassif* text messages were not provided to Respondent until September 12, 2013, and that they do not explain the thousands of text messages Respondent exchanged with Vargas before her drunk driving incident. (Tx. p. 64) Although Respondent testified that before he had received the *Nassif* texts, he assigned Vargas to work on a Motion to Preserve Status Quo which was scheduled

¹² Respondent's cell phone records were part of the discovery materials.

for August 15, 2013, he admitted that the motion was filed the day of or a few days before that hearing date and that prior to August 15, 2013, his only contact with the *Nassif* case was a conversation he had with the magistrate regarding *Nassif*'s arraignment. (Tx. p. 63) Clearly, Respondent's representations that the "vast" majority of the text messages between him and Vargas were related to the *Nassif* matter were false.

Likewise false was Respondent's testimony that in July of 2013, he observed large bruises on Vargas's leg and neck (Tx. p. 212, 213) and that he went to the scene of Vargas's arrest only to make sure she was "OK" (Tx. p. 96) because "he was worried that the incident might be related to her abusive ex-boyfriend."¹³ (E's Exh. 2, p. 2, par. 8; E's Exh. 4, p. 2; Tx, p. 102) First, Respondent was aware that Vargas was fine when she called him immediately after the accident happened. (E's E's Exh. 2, p. 2, par. 8) This was confirmed by Officer Cole who also advised Respondent that Vargas was fine when first approached the scene (E's Exh. 7; E's Exh. 9) and by Vargas herself when Respondent approached and spoke to her during her sobriety tests. (E's Exh. 7; E's Exh. 9)

Next, as was noted previously, Vargas testified that she was never physically assaulted by her ex-boyfriend, Matthew Foglia. (MR, p. 8; E's Exh. 27, p. 82). That testimony was supported by the police report she had filed in January of 2013 in which she denied any violence from her ex-boyfriend. (MR, p. 8; E's Exh. 27, p. 83)

¹³ Respondent's claims regarding the reasons for his appearance at the scene of Vargas's accident and arrest were the basis for Paragraphs 68 and 69 of FC 96.

Vargas also testified that on the date of her accident, her contacts with her ex-boyfriend were limited to his texts about outstanding utility bills and a large screen television they had purchased while living together. (MR, p. 9; E's Exh. 27, p. 17-18) Finally, and perhaps most revealing, once at the scene of the accident, Respondent never asked Officer Cole or Vargas about the ex-boyfriend. (MR, p. 9) As the Master stated, this evidence clearly suggested that Respondent appeared at the scene of Vargas's accident not out of any concern for her safety, but "to inject himself into the investigation in support of Ms. Vargas." (MR, p. 10)

Also false were Respondent's claims and his formal hearing testimony that he "did not at any time while at that scene [of Vargas's accident] in any way intrude on the officer's conduct or his investigation" and that he "did not ask for or suggest or imply in any way that he wanted special treatment for Ms. Vargas."¹⁴ (E's Exh. 4, p. 2; MR, p. 10-11) As the Master stated, Respondent's conduct on the scene of Vargas' arrest must be taken in light of his extensive prosecutorial and judicial experience with drunk-driving cases. (MR, p. 10) Considering that experience, it is clear that from the moment he arrived at the scene, Respondent knowingly and intentionally interfered with Officer Cole's investigation. Respondent's presence and continued approach, after he was identified by Vargas as "Judge Simpson," caused Officer Cole to abandon his investigative routine of instructing family members and friends of a suspect to remain in their vehicles until the investigation is completed. Respondent's

¹⁴ These claims, which Respondent made in his answer to the 28-Day Letter, formed the basis for Paragraphs 72 through 75 of FC 96..

actions also caused Officer Cole to leave a drunk-driving suspect unattended during her sobriety tests and to allow her to engage in a conversation with Respondent during those tests.

Based on his experience with drunk driving cases, Respondent also knew that the statement, “I just want to make sure that [Vargas] is okay to drive” meant that Officer Cole was about to assess her sobriety. Respondent’s reply, “Well, does she just need a ride of something” (Tx. 250-253) was a clear suggestion to short circuit the investigative process and for Officer Cole to allow him to take Vargas home. (MR, p. 10; p. 11) Respondent was given special treatment by being allowed to talk to Vargas. He then continued to involve himself, hoping that the special treatment will be extended to allowing him to become Vargas’ ride. (MR, p. 11) This evidence established that Respondent’s actions intruded on Officer Cole’s investigation and that Respondent clearly wanted special treatment for her. By denying it in his answers to the Commission’s 28-Day Letter (E’s Exh. 4), in his Answer to FC 96, and in his testimony at the formal hearing, Respondent lied.

Respondent also lied when he represented to the Commission and when he testified at the formal hearing that he “at no time...attempted to interfere with [Lillich’s] exercise of his prosecutorial discretion” (E’s Exh. 2, p. 4-5, par. 28) and that the reason he had contacted Lillich was to obtain the police reports to determine whether Vargas “had been truthful with him” and whether she “could be trusted as an intern” in his court. (E’s Exh. 4, p. 3) Likewise, Respondent lied when he represented

to the Commission, in his Answer to FC 96, and when he testified before the Master that the reason he questioned the reliability of Vargas' on-the-scene alcohol testing was so that he could evaluate whether to retain Vargas as his intern. (E's Exh. 4, p. 4, R's Ans. Par. 43; Tx. p. 225-226)

As was discussed in detail in Count II, Respondent's misrepresentations were made obvious by his failure to obtain the police report and the results of the Data-Master tests from his long-time friend, Deputy Chief, Gordon Schick and the fact that even after he was provided the information he requested, he continued calling Lillich to argue on behalf of Vargas's good character and against the reliability of the evidence against her. As the Master stated, a concern about an intern's integrity would not be prefaced with her being a "good kid from Texas and in a bad relationship," followed with a call about potential defense attorneys." (MR, p. 5)

Respondent was also untruthful when he testified that when Vargas called him at about 4:25 AM on September 8, 2013,¹⁵ she was upset and yelling in Spanish and that other than the words "Burger King" and "Michigan," he could not understand what she was saying. (Tx. p. 90-91) The scout car video, together with the testimony of Allan Cook, the tow truck driver, and Officer Cole, proved that Respondent's testimony was false.

Immediately after the accident, Cook saw Vargas on her cell phone, calm, and not speaking in a foreign language. (Tx. p. 179-182) The same observation was made

¹⁵ The reference, in the Master's report, to September 8, 2014, appears to be a typographical error.

by Officer Cole who had arrived at the scene while Vargas was still on the phone with Respondent and who did not see Vargas upset or speaking in a foreign language. The testimony of these witnesses was supported by the scout car video in which Vargas appeared giddy rather than upset or hysterical. (E's Exh. 7)

Finally, Respondent made an intentional misleading statement when he testified at the public hearing that he did not have any contact with Vargas, by text message or otherwise, between midnight and 4:00 AM on September 8, 2013. In so finding, the Commission relied on the Sprint telephone records showing that in fact, Respondent and Vargas exchanged six text messages between 1:25 and 2:29 AM on that morning.

D. CONCLUSION

The evidence in this matter overwhelmingly supports the Commission's conclusions that Respondent engaged in improper, unethical, and illegal conduct on the scene of Vargas' arrest and in his contacts with Lillich. The evidence also supports the Commission's conclusion that Respondent made numerous misrepresentations during the investigation of this matter as well as in his Answer to FC 96 and during his testimony before the Master.

Despite his attempt to portray himself as a dedicated jurist and a mentor to his law school students, Respondent used his judicial position to interfere with a police investigation in order to insure that Vargas, with whom he had established a personal relationship, was not arrested for driving while drunk and causing a collision. When

Respondent was not successful on the scene of the accident, he used his judicial position to interfere in the prosecution of Vargas's OWI case by contacting Lillich, questioning the reliability of the evidence, discussing attorneys that Vargas should consider retaining, and delaying the issuance of the warrant for almost two months. These actions are not only irresponsible, improper and unethical, they constitute obstruction of justice.

Respondent was not only a judicial officer, he was a supervisor to Vargas as well as a number of other interns at the 14-A District Court. As such, he had a responsibility to teach them about acceptable professional business practices. Respondent failed to discharge that responsibility. Furthermore, by his actions, Respondent caused harm and embarrassment to Vargas, Lillich, and the Pittsfield Township Police Department, as well as the legal profession and the bench.

III. DISCIPLINARY ANALYSIS

A. The Brown Factors

The Michigan Supreme Court set forth the criteria for assessing proposed sanctions in *In re Brown*, 461 Mich 1291, 1292-1293, 625 NW2d 744 (1999).

(1) Misconduct that is part of a pattern or practice is more serious than isolated instances of misconduct.

Respondent's actions involved numerous breaches of the Canons and appropriate ethical conduct as well as a violation of a criminal statute, to wit, obstruction of justice. Within a few weeks of accepting Vargas as an intern in his

court, Respondent established a personal relationship with her. Then, rather than setting an example and teaching Vargas about acceptable and professional business practices, Respondent began a pattern of exchanging thousands of text messages and hundreds of phone calls with her. Not only were these texts and calls made outside of the court's regular business hours, many were made in the middle of the night and into the following morning.

Motivated by that personal relationship, Respondent also engaged in a series of inappropriate actions at the scene of the accident that Vargas caused while driving drunk. Respondent injected himself into the investigation, became a witness in the case, interrupted sobriety tests, engaged in conversations with Vargas without the officer's permission, and offered to short circuit the investigation by driving Vargas home.

When he did not succeed in averting Vargas' arrest, Respondent continued his improper and illegal conduct by initiating contact with the city attorney, Victor Lillich, in an effort to block criminal charges from being issued against her. From the very first phone call, made before the Pittsfield Township Police Department had a chance to submit a warrant request, Respondent began to act as Vargas' advocate, presenting her in a favorable light and arguing against the reliability and sufficiency of the evidence. Respondent's course of conduct caused a substantial delay in the processing of the Vargas warrant request and ultimately resulted in Lillich disqualifying himself and his law firm from reviewing it. Respondent's conduct also

caused the disqualification of the entire 14-A District Court bench from the Vargas matter and the assignment of the Hon. Theresa Brennan as a visiting judge. Respondent's conduct is not an isolated instance of misconduct. This factor weighs heavily in favor of the imposition of a more severe sanction.

(2) Misconduct on the bench is usually more serious than the same misconduct off the bench.

Respondent's misconduct, while not committed when Respondent was on the bench, was nevertheless directly related to Respondent's judicial position and the misuse of his judicial office. Respondent established a personal relationship with Vargas while she was an intern at the 14-A District Court and, by his own admission, engaged in numerous text and phone conversations with her about "sensitive" matters assigned to his judicial docket. Respondent's conduct was also contrary to the law.

As the Michigan Supreme Court stated, a judge's conduct must not undermine the public's faith that judges are as subject to the law as those who appear before them. *In re Noecker*, 472 Mich 1, 13 (2005). Respondent's conduct clearly did not instill such belief in those who became aware of his actions through the media coverage of this matter. This factor weighs heavily in favor of the imposition of a severe sanction.

(3) Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of impropriety.

Respondent's misconduct was clearly prejudicial to the actual administration of justice. His interference with the duties of a police officer on the scene of the

accident as well as his interference in the prosecution of the Vargas case, and his misrepresentations to the Commission and to the Master during the formal hearing are contrary to the proper administration of justice. This factor weighs heavily in favor of the most extreme sanction.

(4) Misconduct that does not implicate the actual administration of justice or its appearance of impropriety, is less serious than misconduct that does.

As stated in Factor 3, the nature of Respondent's misconduct reflects a lack of respect for justice and the courts and goes to the very heart of the proper administration of justice.

(5) Misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated.

Respondent's misconduct is part of a pattern of deliberate, premeditated behavior. From the very first text message he had exchanged with Vargas in July of 2013, and until end of October, 2013, when Vargas' warrant request was "denied" by Lillich and re-submitted to the Washtenaw County Prosecutor's Office, Respondent repeatedly disregarded the ethical obligations that are imposed on members of the judiciary. Respondent also violated the very laws that he was entrusted to enforce and caused others to do the same. The following acts clearly establish the deliberate, unethical and illegal courses of conduct by Respondent:

1. Engaging in a personal relationship with Vargas while she was an intern at the 14-A District Court.

2. Appearing at the scene of a police investigation in the very jurisdiction in which he is a judge.
3. Interfering with Officer Cole's investigation of Vargas' drunk driving accident.
4. Repeatedly engaging in ex-parte communications with Lillich about a pending warrant request.
5. Making repeated misrepresentations to the Commission during the investigative stage of this matter.
6. Making repeated misrepresentations in his Answer to FC 96.
7. Repeatedly testifying falsely while under oath during the formal hearing before the Master.

This factor weighs heavily in favor of the imposition of the most extreme sanction.

(6) Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.

Just results cannot occur when Respondent appears on the scene of a police investigation in his own jurisdiction. Just results also cannot occur when Respondent interferes in the prosecution of a drunk-driving case for the sole purpose of satisfying his and his intern's personal objectives and agendas. Just results do not, and cannot occur when Respondent deliberately violates the law and ethics. This factor weighs heavily in favor of the imposition of the most extreme sanction.

(7) Misconduct that involves the unequal application of justice on the basis of such considerations as race, color ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of class of citizenship.

There is no evidence that Respondent's conduct was based on any consideration of a class of citizenship. This factor is not an issue in this case.

The totality of the Brown factors weighs extremely heavily to the severest sanction available: removal.

B. Other Considerations

The Commission has also considered other factors in past cases as suggested by the American Judicature Society.¹⁶

(1) The Judge's conduct in response to the Commission's inquiry and disciplinary proceedings. Specifically, whether the judge showed remorse and made an effort to change his or her conduct and whether the judge was candid and cooperated with the Commission.

The Michigan Supreme Court has previously addressed this issue in its consideration of sanctions, although it is not identified in *Brown, supra*, as a specific factor. Misrepresentations, lies and deceitful testimony by a judge constitute a sufficient basis for removal from office. As the Michigan Supreme Court has stated in *In re Justin*, 490 Mich 394, 424 (2012):

[S]ome misconduct, such as lying under oath, goes to the very core of judicial duty and demonstrates the lack of character of such a person to be entrusted with judicial privilege.

A judge who lies under oath is unfit to be a judge. *In re Justin, supra*.

¹⁶ "How Judicial Conduct Commissions Work," American Judicature Society, 1999, pp. 15-16.

In the present case, Respondent continues to insist that by appearing at the scene of Vargas' accident and by contacting Lillich on her behalf, he had done nothing wrong. Respondent justifies his improper behavior by providing false testimony to the Commission and before the Master which was discredited by other witnesses and by properly admitted evidence. Clearly, Respondent had demonstrated that he has absolutely no respect for his judicial position or appreciation for the serious nature of the charges against him or the overwhelming evidence in support of those charges. This factor weighs heavily in favor of the imposition of the most extreme sanction.

(2) The effect the misconduct had upon the integrity of and respect for the judiciary.

Respondent's misconduct has been the subject of extensive media coverage, which casts not only Respondent but also the judiciary as a whole in a negative light.

(3) Years of judicial experience.

Respondent has been a judge on the bench of the 14-A District Court since 1999. There is no mitigation because of inexperience. To the contrary, Respondent's length of service only exacerbates the wrongfulness of his behavior.

C. Proportionality.

As the Michigan Supreme Court stated in the case of *In re Ferrara*, 458 Mich 350 (1998);

Our primary concern in determining the appropriate sanction is to restore and maintain the dignity and impartiality of the judiciary and to protect the public.

In the case of *In re James*, 492 Mich 553 (2012), Justice Stephen J. Markman emphasized that our judicial system “is only as good as its constituent judges.” In support of that principle, Justice Markman relied on the case of *In re Probert*, 411 Mich 210 (1981) wherein the Supreme Court declared that:

[W]hen one commits judicial misconduct he not only marks himself as a potential subject of judicial discipline, he denigrates an institution. Accordingly, a decision on judicial discipline must also be responsive to a significant institutional consideration, “the preservation of the integrity of the judicial system.” Institutional integrity, after all, is at the core of institutional effectiveness. *Id.* at 231

In the present matter, Respondent’s improper, unethical and illegal conduct is inexcusable. He has violated the Code of Judicial Conduct as well as Michigan court rules and statutes, and he has provided false and misleading answers to the Commission’s inquiries and continued to provide perjured testimony during the hearing before the Master. It is abundantly clear that Respondent has absolutely no respect for the very law that he is entrusted to enforce, and which he is obligated to observe in all activities. Respondent’s misconduct conveyed the message that those who are in power are free to disregard the very laws that govern our society and which the less powerful must follow. The misconduct of the kind in each count alone would be the basis for the imposition of the most serious sanction. Together with Respondent’s misrepresentations during the formal hearing in this matter, the

misconduct is so extreme and extensive that only the severest sanction of removal is appropriate.

D. Costs

MCR 9.205 provides in part:

In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.

The evidence overwhelmingly supports that Respondent engaged in numerous instances of misconduct and violations of law. Respondent also made intentional misrepresentations and misleading statements to the Commission and to the Master during the formal hearing. Respondent should be ordered to pay the costs incurred by Commission in the amount of \$7,565.54.

RECOMMENDATION

Respondent's misconduct is persistent and deliberate. As noted above, there is overwhelming evidence to support a finding of misconduct with reference to the allegations in each of the counts in FC 93 as well with reference to Respondent's false testimony during the Formal Hearing of FC 93 itself. Respondent, in various manners of misconduct is responsible for:

1. Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205.

2. Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205.
3. Conduct which is prejudicial to the proper administration of justice, in violation of MCR 9.104 (1).
4. Conduct which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104 (2).
5. Conduct which is contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104 (3).
6. Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104 (4).
7. Lack of personal responsibility for one's own behavior and for the proper conduct and administration of the court in which one presides, contrary to MCR 9.205 (A).
8. Failure to establish, maintain, enforce, and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct Canon 1.
9. Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A.
10. Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, Canon 2A.
11. Failure to respect and observe the law and to conduct oneself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary contrary to the Code of Judicial Conduct, Canon 2B.

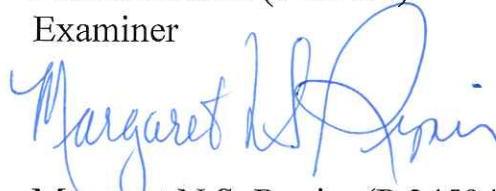
12. Conduct in violation of the Code of Judicial Conduct, Canon 2C that a judge should not allow family, social, or other relationships to influence judicial conduct or judgment.
13. Conduct in violation of the Code of Judicial Conduct, Canon 2C that a judge should not use the prestige of office to advance personal business interest or those of others.
14. Conduct in violation of Code of Judicial Conduct, Canon 3A (4) that a judge shall not initiate, permit, or consider ex parte communications.
15. Conduct that violates a criminal law of a state or of the United States, contrary to MCR 9.104(5).
16. Conduct in violation of MCL 750.505.

WHEREFORE, the Examiner requests that the Commission recommend to the Supreme Court that Respondent be REMOVED from office and be ordered to pay costs in the amount of \$7,565.54.

Respectfully submitted,



Paul J. Fischer (P 35454)
Examiner



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Dated: November 17, 2015